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Constitutional Law—Expanding the Intent Requirement in Northern School Desegregation Cases

EXPANDING THE INTENT REQUIREMENT IN NORTHERN SCHOOL DESEGREGATION CASES

Racial segregation in northern public school systems[1] has increasingly become the focus of litigation which has revealed a form of racial discrimination far more complex and subtle yet equally as serious[2] as that found in the South.[3] Thus when the Supreme Court of the United States announced that the distinguishing factor between de jure and de facto segregation[4] is intent to segregate,[5] the standard to be used for

1. Substantial racial imbalance exists throughout non-southern public school systems. In 1971 roughly 57% of black pupils in the North and West attended schools with over 80% minority enrollment while in the South only 32% of black pupils attended such schools. The percentages of black pupils attending schools with more than 80% minority in some of the northern cities are: Compton, Cal.—97.8%; Gary, Ind.—95.7%; Cleveland, Ohio—91.3%; Newark, N.J.—91.3%; Los Angeles, Cal.—86.6%; Milwaukee, Wis.—78.8%. Keyes v. School Dist. No. 1, 413 U.S. 189, 218-19, nn.3 & 4 (1973). In New York City in 1970, 65.7% of its black pupils attended schools with more than 80% minority enrollment. Ribicoff, *The Future of School Integration in the United States*, 1 J.L. & EDUC. 1, 14 (1972).

2. Similar conditions exist in both the North and South which have a detrimental impact on a child's motivation and self-image: scarcity of educational materials, dilapidated facilities and overcrowding. The myriad of causal factors underlying such conditions include discriminatory housing practices, socio-economic status of blacks, individual preferences and prejudices in residency choice, and assignment to schools by neighborhoods. The result is the establishment of segregated situations that make it possible for school authorities to use subtle methods, such as constructing new schools in all black neighborhoods or gerrymandering school attendance, without establishing the clear prejudicial connection to state action that provides the basis for judicial intervention in the South. *See generally* U.S. COMM'N ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA 1974; U.S. COMM'N ON CIVIL RIGHTS, PUBLIC SCHOOLS, CITIES IN THE NORTH AND WEST 1962; Fiss, *Racial Imbalance in the Public Schools: Constitutional Concepts*, 78 HARV. L. REV. 564, 567-74 (1965) [hereinafter cited as Fiss]; Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 400-35 (1972) [hereinafter cited as Goodman].

3. When the distinction is made between "northern" and "southern" cases or jurisdictions, the basis for distinction is not necessarily geographical but the presence of statutes that authorized or compelled racial separation at the time of Brown v. Board of Education, 347 U.S. 483 (1954).

4. De jure and de facto segregation have been defined as follows: "[D]e jure should refer to segregation created or maintained by official act, regardless of its form. De facto segregation should be limited to segregation resulting from fortuitous residential patterns." Taylor v. Board of Educ., 191 F. Supp. 181, 194 n.12 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir. 1961). *See* Moses v. Washington Parish School Bd., 276 F. Supp. 834, 840 (D.C.

establishing intent became vitally important to future public school desegregation efforts in the North. The determination of such a standard was the primary question in *Hart v. Community School Board of Education.*[6]

In *Hart* plaintiffs sought declaratory and injunctive relief from alleged racial discrimination practiced by the local and city boards of education at a junior high school.[7] The district court found that defendants could have reasonably foreseen that their policies would have a segregative effect[8] and further that defendants failed to mitigate that effect.[9] The court concluded that defendants were responsible for these conditions even though it found that their actions were not racially motivated.[10] The Court of Appeals for the Second Circuit affirmed the

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La. 1967); Hobson v. Hansen, 269 F. Supp. 401, 493 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Fiss, *supra* note 3, at 584.

5. Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

6. 383 F. Supp. 699, *enforced*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

7. 383 F. Supp. at 706. Defendants impleaded city, state and federal housing authorities as the parties allegedly responsible for any segregated conditions that existed at the junior high school. The court mooted the third party complaint but retained jurisdiction over the third party defendants for remedial purposes. The Second Circuit subsequently dismissed this complaint because it involved too many parties and issues. 512 F.2d at 41. Other courts have held similar complaints justiciable. *See, e.g.*, Ybarra v. City of San Jose, 503 F.2d 1041 (9th Cir. 1974); Armour v. Nix, Civil No. 16708 (N.D. Ga. 1975); Mapp v. Board of Educ., 341 F. Supp. 193 (E.D. Tenn.), *aff'd*, 477 F.2d 851 (6th Cir. 1973). A considerable amount of evidence exists which would provide a basis for finding the government liable for the segregated housing conditions that are largely responsible for the segregated school patterns. *See* Gautreaux v. Hills, 96 S. Ct. 1538 (1976); Rubinowitz & Dennis, *School Desegregation versus Public Housing Desegregation: The Local District and the Metropolitan Housing District*, 10 URBAN L. ANN. 145 (1975). *See also* S. REP. NO. 92-000, 92d Cong., 2d Sess. 121-22 (1972) ("it is clear that federal, state and local government practices at every level have contributed to housing segregation which exists today"); Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, 16 CASE W. RES. L. REV. 502, 514 (1965); Fiss, *supra* note 2, at 586. For a thorough exploration of this point as a possible basis for holding the State liable for segregated schools on a metropolitan basis see Kushner & Werner, *Metropolitan Desegregation After* Milliken v. Bradley: *The Case for Land Use Litigation Strategies*, 24 CATH. U.L. REV. 187 (1975).

8. 383 F. Supp. at 711-13, 721. Seventeen per cent of the student population of the school district was non-white; 41% of these students went to the particular junior high school which was 82% non-white and using only 41% of its facilities.

9. "Feeder" school and construction regulations promulgated by defendants hastened the racial imbalance. Yet despite constant warnings of community leaders and some school board members regarding the segregated conditions created by the school board regulations, defendants refused to implement any effective regulations to reduce the segregation. *Id.* at 715-21.

10. *Id.* at 721.

district court decision and held that there was a basis for the finding of de jure segregation.[11]

The constitutional basis for the *Hart* decision and for a substantial portion[12] of all desegregation litigation is the equal protection clause of the fourteenth amendment.[13] To establish a violation in school segregation cases, plaintiff traditionally is required to prove the existence of a "segregated" condition,[14] "state action" which has caused or maintained the "segregated" condition,[15] and that such "state action" was intentional.[16] Racial imbalance alone is insufficient to establish the existence of a "segregated" condition within a school or school system.[17] The attitudes of the community and the school administration must also be taken into consideration.[18] Racial imbalance is, however, a signal for courts to closely scrutinize the facts of the case.[19]

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11. 512 F.2d at 50. The district court did not base its opinion on de jure segregation. 383 F. Supp. at 732.

12. Desegregation decisions are also based on 42 U.S.C. § 1983 (1970).

13. U.S. CONST. amend. XIV, § 1, forbids states from "deny[ing] any person . . . equal protection of the law."

14. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 196 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971); notes 18-19 *infra*.

15. *See* Milliken v. Bradley, 418 U.S. 717, 746 (1974); Cooper v. Aaron, 358 U.S. 1, 16-17 (1958); notes 20-22 *infra*.

16. When the state's actions expressly advocate the creation of dual school systems, proof of this requirement becomes unnecessary. But when the state's actions are facially neutral, the need to prove an underlying segregative design becomes important. This requirement is a well-established prerequisite for proving an equal protection violation. *See, e.g.*, Snowden v. Hughes, 321 U.S. 1, 8 (1944). *See also* Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

For support of this three-part analysis of the equal protection clause see Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 182 (6th Cir. 1974); Husbands v. Commonwealth, 395 F. Supp. 1107, 1135 (E.D. Pa. 1975); 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 124, 149 (1974). Note that when the Supreme Court in Brown v. Board of Educ., 347 U.S. 483 (1954), indicated that "separate educational facilities [for different races] are inherently unequal," state maintenance of such facilities became a clear violation of the equal protection clause. *Id.* at 495.

17. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 196 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971); Fiss, *supra* note 2, at 608.

18. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

19. In Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971), the Court declared that "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of . . . the Equal Protection Clause is shown." One possible explanation for the Court's singling out of these particular factors is that they are almost entirely under the control of the school authorities. The Court went on to point out that "in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools

Once a "segregated" condition has been shown to exist, it is then necessary to establish a causal connection between that condition and action by the state.[20] The exact nature and degree of this causal connection in the area of school segregation cases has not been well-defined.[21] The majority of cases have found a sufficient nexus between the state and a local school board to enable the court to equate board actions with state action, thus establishing the necessary causal connection.[22]

When the local board's actions are facially neutral yet create a discriminatory result, the final requirement of proof of an intent to create or maintain the segregated conditions becomes critical.[23] Two policy considerations have traditionally justified the imposition of the intent requirement: first, the inherent limitations on a court's ability to

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that are substantially disproportionate in their composition." *Id.* at 26. *See also* Milliken v. Bradley, 418 U.S. 717, 741 n.19 (1974).

20. The Supreme Court has established an exception when there has been a finding of intentionally segregative school board action in a significant portion of a school system. In such a case there is a presumption that other segregated schools are not adventitious, and the burden shifts to the school authorities to prove otherwise. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973). The Supreme Court has found a causal connection where the state involvement has been very remote in past non-educational racial discrimination cases. *See, e.g.*, Evans v. Newton, 382 U.S. 296, 299-301 (1966) (private individuals are agents of the state when they exercise public functions, therefore operating a private segregated municipal park is state action); Griffin v. Maryland, 378 U.S. 130, 135-37 (1964) (state enforcement of segregated policy in private amusement park through eviction and arrest is state action); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (restaurant located in public garage; state is responsible for the owner's discriminatory actions). *But see* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (public utility's decision to cut off power not subject to due process requirements because it was not state action); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (racially discriminatory state liquor board regulations did not sufficiently implicate the state in racial discrimination practiced by a private club to make those practices state action).

21. Milliken v. Bradley, 418 U.S. 717, 745 (1974), suggests that a causal relationship must be substantial, but does not indicate how substantiality is to be determined. *But see* Comment, *Public School Segregation and the Contours of Unconstitutionality: The Denver School Board Case*, 45 U. COLO. L. REV. 457, 467-68 (1974) (it is suggested that as a result of *Swann* the position of the Supreme Court is very broad with regard to this issue). The lower courts are widely divided on this question. *See* Note, *De Facto School Segregation and the "State Action" Requirement: A Suggested New Approach*, 48 IND. L.J. 304, 314 & n.50 (1973); Note, *Segregation in the Metropolitan Context: The "White Noose" Tightens*, 58 IOWA L. REV. 322 (1972).

22. *See* Cooper v. Aaron, 358 U.S. 1, 16-17 (1958).

23. *See* note 16 *supra*. This requirement has been emphasized in opinions dealing with various types of state action. *See, e.g.*, Wright v. Rockefeller, 376 U.S. 52, 56-7 (1964) (discriminatory legislative action); United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974) (selective criminal enforcement); Powell v. Workmen's Compensation Bd., 327 F.2d 131, 137 (2d Cir. 1964); Burt v. City of New York, 156 F.2d 791, 792 (2d Cir. 1946) (city building department).

explore all factors that may provide the basis for the state's action;[24] and second, the realization that most legislative classifications invariably have some discriminatory effect.[25] To satisfy the intent requirement, no reasonable basis may exist to support the racial classifications drawn by the state.[26] When it is not evident from the state's acts per se that the racial classifications are unreasonable,[27] plaintiffs must then prove an intent to create segregated conditions in order to negate all other reasonable explanations for the state's discriminating actions.[28]

Absent definitive articulation from the Supreme Court of the intent necessary to find educational segregation,[29] the lower courts have split over the intent requirement.[30] Some courts contended that state action must be shown to be actually motivated by the desire to create or

24. *See* Madden v. Kentucky, 309 U.S. 83, 88 (1940) ("[s]ince the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination . . . .").

25. *See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). *See also* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 358 n.35 (1949) (the duty of legislatures is to discriminate by recognizing relevant distinctions and formulating reasonable classifications); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1098 (1969) (suggesting that the requirement of a showing of discriminatory intent as a "necessary basis for challenging administrative action on equal protection grounds . . . may represent a recognition that the practical difficulties in administration may make selective application of a statute necessary or inevitable"); 61 COLUM. L. REV. 1103, 1115-22 (1961).

26. *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961): "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *See also* Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947).

27. In Brown v. Board of Educ., 349 U.S. 294, 298 (1955) (*Brown II*), the Supreme Court indicated "that *racial* discrimination in public schools is unconstitutional" (emphasis added) thus suggesting that any classification by race would be considered intrinsically unreasonable.

28. Under the new equal protection doctrine when a fundamental right or suspect category is involved, initial proof by the plaintiff of intent would be unnecessary since the burden of justification is cast on the state rather than the challenging party. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969). Since the Supreme Court indicated in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973), that it did not consider education to be a fundamental right and since no suspect classification is expressly involved, it is arguable that the new equal protection doctrines will not be applicable.

29. *See, e.g.*, Davis v. School Dist., 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

30. Some courts have held that state authorities have an affirmative duty to alleviate racial imbalance, regardless of the cause. *See, e.g.*, Brewer v. School Board, 397 F.2d 37 (4th Cir. 1968); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck

maintain the segregated conditions (the motive view);[31] other courts contended it was only necessary to prove that the effect of state action was the creation or maintenance of segregated conditions (the effect view).[32] The source of these conflicting positions may be traced to different interpretations of the nature of the violation proscribed in *Brown v. Board of Education*.[33] Courts favoring the motive view found the source of the constitutional violation in the state authorities' use of racial criteria in making school decisions.[34] Courts adopting the effect

v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Barksdale v. Springfield School Comm., 237 F. Supp. 543, 546 (D. Mass.), *vacated on other grounds*, 348 F.2d 261 (1st Cir. 1965). A few courts created a rebuttable presumption of intent to segregate when severe racial imbalance exists. *See, e.g.*, United States v. Board of Comm'rs, 368 F. Supp. 1191 (S.D. Ind. 1973), *rev'd in part*, 503 F.2d 68 (7th Cir. 1974); Davis v. School Dist., 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); United States v. School Dist. 151, 286 F. Supp. 786 (N.D. Ill.), *aff'd*, 404 F.2d 1125 (7th Cir. 1968). Other courts followed the foreseeable effect approach used in *Hart*. *See, e.g.*, United States v. Texas Educ. Agency, 532 F.2d 380, 390 (5th Cir. 1976); United States v. School Dist. of Omaha, 521 F.2d 530 (8th Cir. 1975); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974); Hoots v. Pennsylvania, 359 F. Supp. 807 (W.D. Penn. 1973); Bradley v. Milliken, 338 F. Supp. 582, 592 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *aff'd in part, rev'd in part*, 418 U.S. 717 (1974).

31. *See, e.g.*, Husbands v. Pennsylvania, 395 F. Supp. 1107, 1133 (E.D. Penn. 1975); Morales v. Shannon, 366 F. Supp. 813, 829 (W.D. Tex. 1973); Henry v. Godsell, 165 F. Supp. 87, 91 (E.D. Mich. 1958); *cf.* Soria v. Oxnard, 488 F.2d 579, 585 (9th Cir. 1973). The Supreme Court has on various occasions warned against judicial review of legislative or administrative motivation. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) (inherent difficulties of ascertaining a collective will); United States v. O'Brien, 391 U.S. 367, 383-84 (1968) (impropriety of striking down an otherwise constitutional statute on the basis of an illicit legislative motive).

32. *See* Berry v. School Dist. of City of Benton Harbor, 505 F.2d 238 (6th Cir. 1974); Pride v. Community School Bd., 482 F.2d 257 (2d Cir. 1973); Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142 (5th Cir. 1972). Using an "effect test" essentially eliminates the intent requirement with regard to school desegregation cases.

33. 347 U.S. 483 (1954) (*Brown I*). Several commentators have pointed out that *Brown I* never clearly indicated whether it was the result of segregated education or the cause of the segregated education (the official mandate) which was deemed violative of the equal protection clause. *See* Fiss, *supra* note 2, at 602-03; Goodman, *supra* note 2, at 276-77; Note, *De Facto School Segregation and the State Action Requirement*, *supra* note 21, at 306; 40 CONN. B.J. 493, 501 (1966); 69 NW. L. REV. 799, 803 n.30 (1974); 9 VILL. L. REV. 283, 285 (1964).

34. Support for this view has been found in Brown v. Board of Educ., 349 U.S. 294, 298 (1955) (*Brown II*) in which Chief Justice Warren explained that *Brown I* held "that *racial* discrimination in public education is unconstitutional" (emphasis added). Literal application of this view would require public officials to be "color blind" when discharging their duties. *See* Tometz v. Board of Educ., 39 Ill. 2d 593, 607-09, 237 N.E.2d 498, 505-07 (1968) (House, J., dissenting). *But see* Fiss, *supra* note 2, at 602-03 (arguing that racially imbalanced schools confront the courts with a different social problem than that presented in *Brown I* and use of an interpretation based on *Brown I* only obscures the special aspects of the problem); *Developments in the Law—Equal Protection*, *supra* note 25, at 1089 (contending that *Brown I* "does not appear to be based on color blind principle because the

view found the source of the constitutional violation in the harmful effects of the segregated conditions.[35]

Although neither the motive nor the effect view has been expressly approved by the Supreme Court, previous decisions appear to support the validity of both. In *Green v. County School Board*,[36] the Supreme Court held that school authorities had an affirmative duty to convert segregated districts to a "unitary system."[37] The imposition of an affirmative duty clearly indicates that the elimination of racial motivation is not the ultimate goal in school desegregation cases.[38] This concept was reinforced by *Wright v. Council of City of Emporia*[39] which stressed

Court fully discussed the importance of equal educational opportunities and explicitly stressed sociological and psychological evidence of the actual inequality of segregated education").

35. Support for this view has been found in the extensive evidence presented in *Brown I* on the detrimental effect of the segregated conditions and in the Court's statement: "Separate educational facilities are inherently unequal." Brown v. Board of Educ., 347 U.S. 483, 495 (1954). *See* Fiss, *supra* note 2, at 590-91, 594-95. Arguably the effect view originated in McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), which is based on the inequality of segregated educational opportunity rather than the impermissibility of state supported segregation. *See Developments in the Law—Equal Protection, supra* note 25, at 1185. *But see* Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193, 218 (1964) (arguing that the Court is not qualified to settle the issue based upon this rationale).

36. 391 U.S. 430 (1968).

37. *Id.* at 437-38. The origins of the affirmative duty concept are found in U.S. v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966) in which the court contended that *Brown I* and *II* required segregated school systems to "take affirmative action to reorganize their schools into a unitary nonracial system." Prior to *Green* several federal courts had distinguished integration and desegregation. The distinction first arose in Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) and appears to have been incorporated in Title IV of the Civil Rights Act of 1964 which defined desegregation as: "the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C. § 2000c (1970). It is clear that the *Green* decision, at least implicitly seriously undermined the distinction and *Jefferson County* expressly abolished it, 372 F.2d at 846-47 & n.5. The concept of affirmative duty has also been expressly applied by the Supreme Court in an urban setting. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

38. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 224 (1973) (Powell, J., concurring in part, dissenting in part) (arguing that in view of the "affirmative duty" command, the promotion of the de facto/de jure distinction is unprincipled); Note, *Segregation in the Metropolitan Context: The "White Noose" Tightens, supra* note 21, at 331 ("It would seem illogical, under the *Green* rationale, to invalidate a 'freedom-of-choice' plan *not* because it is discriminatory (it is facially neutral), but because it does not achieve the necessary degree of integration, and then fail to invalidate a facially neutral northern system which also produces only minimal integration."). *See also* Goodman, *supra* note 2, at 296.

39. 407 U.S. 451 (1972).

the importance of the effect rather than the motive of school authorities' desegregation efforts. These two cases provide persuasive authority that the effect of the state's action is the ultimate determinant of an equal protection violation.[40]

In *Keyes v. School District No. 1*,[41] however, the Court seemed to approve the motive approach. In *Keyes* neither the state nor the city had enacted racially discriminatory educational statutes.[42] The lower court nevertheless found that the facts indicated racial discrimination in one part of the school district.[43] In reviewing the holding of the court of appeals that racial discrimination in one part of a school district does not indicate a segregative intent in the rest of the district, the Supreme Court established a series of evidentiary guidelines operative when intentionally segregative actions in a meaningful portion of a school system are found.[44] Although the question of intent was not at issue,[45] the majority emphasized that intent to segregate was the differentiating

40. *Id.* at 462.

41. 413 U.S. 189 (1973).

42. *Id.* at 191. *Keyes* is the first school desegregation case in which the Supreme Court expressly recognized the intent requirement. It is also the first Supreme Court opinion to phrase the violation in terms of de jure segregation. It is clear that the Court has drawn a line with regard to the effect view: first, by limiting it in saying that effect alone will not be sufficient in all cases, and secondly by expressly creating the category of de facto segregation for those situations in which intent is absent and segregatory effect is present. Since *Keyes* was also the first northern school desegregation case before the Court, arguably the line has been drawn between northern and southern cases. The idea that there may be two standards, one for the South and another for the North, has been suggested several times. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189, 232 (Powell, J., concurring in part, dissenting in part); Karst, *Not One Law at Rome and Another at Athens: The Fourteenth Amendment in Nationwide Application*, 1972 WASH. U.L.Q. 383.

43. 413 U.S. at 193-95. It was clear that the schools involved *were* segregated. Petitioners originally sought relief regarding some of the most severely segregated schools in the Park Hill area. The action was expanded to include the entire "core city" area. The district court granted relief, relying on Plessy v. Ferguson, 163 U.S. 537 (1896), since the "core city" schools were educationally inferior. 313 F. Supp. 61, 82, 83 (D. Colo. 1970). The Court of Appeals for the Ninth Circuit affirmed the Park Hill ruling but reversed the decision regarding the "core city" area, finding that the showing of deliberate segregation with regard to Park Hill proved no overall policy of segregation. 445 F.2d 990, 1006-07 (10th Cir. 1971).

44. 413 U.S. at 203, 208, 211. Briefly these guidelines are: (1) Proof of state imposed segregation in a substantial portion of a district will indicate a dual school system unless geographical or natural boundaries exist which have the effect of dividing the district into separate units; (2) When the above exception is operative, there still exists a presumption that any segregated school is not adventitious; (3) School boards must either rebut the presumption or show that its acts did not create or contribute to the segregated condition.

45. The court noted that "petitioners apparently concede for the purposes of this case that . . . [they] must prove . . . intentional state action." *Id.* at 198.

factor between de jure and de facto segregation.[46] The Court did not, however, indicate by what standard intent was to be determined,[47] and simply alluded to evidence concerning the extent of segregation,[48] the feeding and zoning patterns,[49] and the site selection and construction of new schools[50] as being of great weight in finding de jure segregation.

The proper standard for discerning segregative intent was the primary issue in *Hart*.[51] Plaintiffs filed suit less than one month after the *Keyes* decision. The district court found defendants responsible for the segregated conditions even though it expressly found that their actions were not racially motivated.[52] On appeal defendants urged that "upon the basis of *Keyes* . . . [a] finding that it [was] guilty of having caused segregation without a finding that its activity was racially motivated is reversible error."[53] In rejecting defendants' contention, the Second Circuit insisted that the Supreme Court in *Keyes* had been concerned solely with what effect the accepted finding of de jure segregation in one part of a school district should have on the status of the remainder of the district.[54] The court concluded that the Supreme Court had no reason to decide "whether intentional action leading foreseeably to discrimination but taken without racial motivation, *might not also* constitute de jure discrimination."[55] The court also concluded that the majority in *Keyes*

46. *Id.* at 208.

47. *Id.* at 233 (Powell, J., concurring in part, dissenting in part).

48. *Id.* at 201-02.

49. *Id.* These elements are commonly recognized as indications of segregation. *See* Marshall, *The Standard of Intent: Two Recent Michigan Cases*, 4 J.L. & EDUC. 227, 230 (1975).

50. 413 U.S. at 201-02; *see* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971) ("In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight."). *See also* United States v. Board of School Comm'rs, 474 F.2d 81, 87-89 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

Another factor considered important by the courts is the presence of reasonable alternatives. *See, e.g.*, Wright v. Council of the City of Emporia, 407 U.S. 451, 461 (1972); Green v. County School Bd., 391 U.S. 430, 439 (1968); Soria v. Oxnard School Dist. Bd. of Trustees, 488 F.2d 579, 588 (9th Cir. 1973).

51. 383 F. Supp. 699, *enforced*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

52. *Id.* at 721.

53. 512 F.2d at 45. Remedial issues included the scope of the district court's equitable remedial powers, whether magnet schools (schools intended to draw gifted students from the entire district) are equivalent to freedom-of-choice (desegregation) plans which have been held inadequate, and the extent to which busing would be permissible.

54. *Id.* at 49.

55. *Id.* (Emphasis added).

did not clearly indicate a *sharp* distinction between northern and southern discrimination or expressly restrict the "judicial methodology of *Wright*, which used an objective test of foreseeable effect rather than racial motive."[56] Ultimately the court found support for its foreseeability test in the purpose of the fourteenth amendment, which is "not . . . to assess blame but to prevent injustice."[57]

Several of the *Hart* court's conclusions appear to be inaccurate. First, the Second Circuit's conclusion that *Keyes* was solely concerned with the effect an accepted finding of de jure segregation in a portion of a district would have on the entire district ignores the emphasis the Supreme Court placed on its statement regarding intent.[58] Second, in concluding that the Supreme Court decisions draw no sharp distinction between northern and southern school desegregation cases, *Hart* ignores the actual effect of *Keyes*, to require an element of proof in northern cases which was unnecessary in southern cases. The precise nature of that element of proof, however, has yet to be defined.[59] Third,

56. *Id.*

57. *Id.* at 50. The court found further support for its standard by pointing out the near impossibility and injustice to innocent parties of trying to ascertain the subjective motives of a collective body. It concluded that the only reasonable test is the more orthodox, objective reasonable man test which is used in the civil and criminal fields of law. The court finally implied that its standard was in tune with recent northern school desegregation decisions in other circuits. *Id.* at 50-51. Closer analysis of the decisions, however, reveals that they provide minimal support for the court's standard, especially when compared with the diverse positions taken in other northern decisions. *See* Morgan v. Kerrigan, 509 F.2d 580, 585-86 (1st Cir. 1974) (failure of the state to remedy any segregated condition as an important variable to consider); Oliver v. Michigan State Board of Educ., 508 F.2d 178, 181 (6th Cir. 1974) (natural and foreseeable standard); Higgins v. Board of Educ., 508 F.2d 779, 790-91, 793 (6th Cir. 1974) (intent to segregate *may* be inferred from severe racial imbalance but the school authorities have no responsibility to foresee "segregation"); Berry v. School Dist. of Benton Harbor, 505 F.2d 238, 243 (6th Cir. 1974) (an effect test); Johnson v. San Francisco Unified School Dist., 500 F.2d 349, 351-52 (9th Cir. 1974) (motive is a relevant but not indispensable consideration). *Compare* United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir. 1974) (permits presumption of intent to be drawn from extreme racial imbalance), *with* Lawlor v. Board of Educ., 458 F.2d 660, 662 (7th Cir. 1972) (no affirmative duty to alleviate racial imbalance). *See also* United States v. Board of Educ., Independent School Dist. No. 1, 459 F.2d 720, 724 (10th Cir. 1972); Board of Educ., Independent Dist. No. 89 v. Dowell, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967); Downs v. Board of Educ., 336 F.2d 988, 998 (10th Cir. 1964) (no affirmative duty to alleviate racially imbalanced situations).

58. 413 U.S. at 208. Throughout the opinion the Court consistently refused to address the question of intent directly; yet if its standard is a valid basis for finding de jure segregation, presumably it is a valid basis for establishing intent.

59. *See* note 42 *supra*. *See also* R. DIXON, DEMOCRATIC REPRESENTATION 473 (1968) (draws an analogy between apportionment cases and education cases on this point, concluding that there are two fourteenth amendments, a mild one for the North and a strict one for the South).

when the court used *Wright* to support its foreseeable effect standard, the authoritative value was negligible, since *Wright* (which was a southern case) concerned a standard used for judging desegregation efforts after an initial determination of de jure segregation has been made.[60]

If *Keyes* requires proof of some form of mental culpability to show intent, then the *Hart* standard at least satisfies that minimal requirement. State actions or omissions which have a foreseeable segregative effect include an element of mental culpability.[61] The *Hart* standard is inadequate, however, if *Keyes* requires proof of actual intent to discriminate.

The solution to these questions may, to a large extent, turn upon the purpose of the equal protection clause and the policy considerations which provide the theoretical basis for the intent requirement.[62] *Green* and *Wright* cast doubt on the theory that the purpose of the equal protection clause in the area of school segregation is to eliminate racial motivation[63] or, as the Second Circuit states, "assess blame."[64] If, however, the purpose of the equal protection clause is to prevent unjust treatment or to eliminate the segregated conditions which are the source of the injustice, a strong case exists for expanding the intent standard. This appears to be the rationale underlying the Second Circuit's decision in *Hart*.

The *Hart* standard will make it easier for plaintiffs to establish a prima facie case of discrimination. Plaintiffs will not have the harsh burden of proving that a collective body was primarily motivated by a desire to discriminate. Plaintiffs need only prove that the state's acts and omis-

60. *See* 407 U.S. 451 (1972). There may be a presumption of unconstitutionality once segregative conditions are present in a system with a history of racial discrimination violations. *See* note 19 *supra*. The presumption that requires proof of intent to segregate (the presumption in favor of constitutionality of the state's act, *see* note 26 *supra*) is then no longer operative.

61. The defendant would at least be guilty of negligence. There is, however, one situation where even a mental culpability standard may not be met, and the defendant would be held liable under *Hart*. The state may be forced to act in a manner that will result in segregation because the alternatives are all found to be unreasonable. If a suspect category or fundamental right were involved, however, this would present no problem, *see* note 28 *supra*, since plaintiff would not have to prove intent. For a standard based solely on the alternatives available see Karst, *Emerging Nationwide Standards for School Desegregation—Charlotte and Mobile*, 1 BLACK L.J. 207, 220 (1971).

62. *See* notes 24 & 25 *supra*.

63. *See* notes 36-38 *supra*. In fact race must be a major consideration in any desegregation plan. *See* McDaniel v. Barresi, 402 U.S. 39, 41 (1971).

64. 512 F.2d at 50.

sions were a foreseeable cause of the segregated school or school district.[65] This broader standard of proof may have its greatest impact on the multi-district school desegregation cases which involve metropolitan regions consisting of black urban cores and white suburban fringes.[66] This growing demographic pattern has led many to believe that effective school desegregation can be achieved only if both areas of the metropolitan region are included in the remedial plans.[67] Since the Supreme Court's pronouncement that multi-district remedies must be based on a multi-district violation,[68] desegregation advocates have been searching for a standard like that in *Hart* which will increase the chances of proving such multi-district violations.

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65. *Id.*

66. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Bradley v. State Bd. of Educ., 412 U.S. 92 (1971).

67. As school districts become racially imbalanced when compared with neighboring districts, the only solution to the problem of desegregation will be to find violations on an interdistrict level. *See* Sedler, *Metropolitan Desegregation in the Wake of Milliken—On Losing Big Battles and Winning Small Wars: The View Largely from Within*, 1975 WASH. U.L.Q. 535; Note, *Developing Litigation Strategies to Achieve Multidistrict Relief: The Legal Implications of* Milliken v. Bradley *for Metropolitan School Desegregation*, 11 URBAN L. ANN. 187 (1975); *cf.* Rubinowitz & Dennis, *School Desegregation Versus Public Housing Desegregation, supra* note 7. The problem is not confined to the North, since new municipalities formed after the *Brown I* decision have never had discriminatory statutes on their books.

68. Milliken v. Bradley, 418 U.S. 717 (1974). For a detailed history of the struggle for equal educational opportunity see Bell, *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 WIS. L. REV. 257.